Filed 7/10/12 In re Junior R. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re JUNIOR R., a Person Coming Under the Juvenile Court Law.	B234614 (Los Angeles County Super. Ct. No. FJ49161)
THE PEOPLE, Plaintiff and Respondent, v. JUNIOR R., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Robin Miller Sloan, Judge. Affirmed as modified; remanded in part.

Leslie G. McMurray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition alleging that appellant Junior R. possessed a firearm in a school zone in violation of Penal Code[1] section 626.9, subdivision (b) and was a minor in possession of a concealed firearm in violation of section 12101, subdivision (a)(1). The court declared the offenses to be felonies, found that appellant was a person described by Welfare and Institutions Code section 602, adjudged appellant to be a ward of the court, and ordered appellant to suitable placement.

Appellant appeals from the orders sustaining the petition and adjudging him to be a ward of the court, contending that there is insufficient evidence to support the juvenile court's finding that he possessed a firearm in a school zone. Appellant further contends that the juvenile court should have found that the section 626.9 violation was a misdemeanor and that counts 1 and 2 merged under section 654. Appellant also contends, and respondent agrees, that appellant is entitled to two additional days of predisposition credit. We affirm the juvenile court's orders, but remand this matter for a determination of appellant's maximum period of confinement. On remand, the court is instructed to correct appellant's predisposition credit to reflect 27 days of predisposition credit.

Facts

On June 24, 2011, about 2:45 p.m., Los Angeles Police Department Officer Elizabeth Holguin and her partner were on patrol. They drove by Sunrise Elementary School, which was visible from the street. Just as they passed the elementary school, Officer Holguin saw appellant ride his bicycle southbound in the middle of Euclid and swerve in and out of traffic. Appellant cut off the officers.

The officers asked appellant to pull over, and he complied. Officer Holguin's partner asked appellant if he had anything on him. Appellant replied that he had a gun in his pocket. Officer Holguin conducted a patdown search of appellant and recovered a

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

loaded 22-caliber revolver in his jacket pocket. The gun was fully loaded, and appeared to be in working order.[2]

The officers used a measuring device to determine that appellant was 950 feet away from Sunrise Elementary School at the time he possessed the loaded, concealed revolver.

Discussion

1. Sufficiency of the evidence

Appellant contends that there is insufficient evidence to show that he was within 1,000 feet of a school or that he knew that he was within 1,000 feet and so the court's finding that he violated section 626.9 must be reversed. We do not agree.

"'In reviewing a challenge to the sufficiency of the evidence, . . . we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) This same standard applies in determining the sufficiency of the evidence to support the true finding of a juvenile court. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.)

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[2] Appellant's mother testified that she taught appellant that it is wrong to carry a loaded gun.

Section 626.9 prohibits the possession of a firearm in a school zone, which means on school grounds or within 1,000 feet of a school.[3]

Here, Officer Holguin testified about the distance from appellant's stop to the school. The prosecutor asked: "Is there a school nearby where this incident took place?" Officer Holguin replied: "Yes, Sunrise Elementary School." The prosecutor asked: "Do you know how far the school is from where you were?" Officer Holguin replied: "It was – we measured it was 950 feet from a school, Sunrise Elementary." The prosecutor asked: "How did you know what the distance was?" Officer Holguin replied: "We measured it with a traffic measuring device to measure the distance."

This is more than sufficient to show that appellant possessed a gun within a school zone, which is the area within 1,000 feet of a school. In context, Officer Holguin's statements clearly meant that she measured the distance from the school to the location where they stopped appellant. Further, since appellant travelled some distance away from the school before he was stopped, he was actually in possession of a gun closer than 950 feet to the school.

Officer Holguin also testified about appellant's activities in relationship to the school. Officer Holguin testified that she first saw appellant as she and her partner were driving south on Euclid. Appellant was riding his bicycle south on Euclid. They stopped him near the intersection of Atlantic and Euclid, which Officer Holguin explained was near a school. When the prosecutor asked Officer Holguin how she knew she was near a school, Officer Holguin replied: "Because we just drove by it." The prosecutor then asked if the school was visible from the street, and Officer Holguin replied that it was. Appellant's attorney asked Officer Holguin if the school was visible from the location where she spotted appellant. Officer Holguin replied that she did not recall, but that

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[3] We grant appellant's request that we take judicial notice of the fact that 1,000 feet is .189 of a mile or 333.3 yards, and that the standard length of a football field is 100 yards.

"[w]e had just past [the school]. I think we saw [appellant] right as we past going down – further down."

It is more than reasonable to infer from this that appellant, who was travelling down the same street as the officers and in the same direction, had also just past the school.

Section 626.9 requires that a "person knows, or reasonably should know" that he is in a school zone. Appellant contends that there is no evidence that he knew or should have known that he was in a school zone.

As we describe, *ante*, Officer Holguin testified that when she first saw appellant, both she and appellant were travelling southbound on Euclid. Officer Holguin had just driven by the school, which was visible from the street. It is reasonable to infer that appellant too had just ridden by the school and saw or should have noticed the school. This is sufficient evidence of the knowledge element of section 626.9.

2. Felony sentence

Appellant contends that his violation of section 626.9 could not properly be declared to be a felony by the juvenile court.

A violation of section 626.9 may be either a misdemeanor or a felony, depending on the circumstances. The punishment for violating section 626.9 is set forth in subdivision (f).

Section 626.9, subdivision (f)(2) provides: "Any person who violates subdivision (b) by possessing a firearm within a distance of 1,000 feet from the grounds of the . . . school . . . shall be punished" as set forth in subparagraphs (A) and (B).[4]

Appellant appears to believe that the trial court based his punishment on subparagraph (A)(iii) and that such punishment is improper. We see no references to subparagraph (A) by the court, or by any counsel. In fact, comments by appellant's counsel and the court suggest that the court declared the offense to be a felony based on subparagraph (B).

Subparagraph (A)(iii) provides for a straight felony sentence. Subparagraph (B), in contrast provides for "imprisonment in a county jail for not more than one year or by imprisonment . . . [in the state prison] for two, three or five years, in all cases other than those specified in subparagraph (A)." Thus, a violation of section 626.9 is a wobbler under subparagraph (B). Appellant's counsel stated that count 1 was a wobbler. No one contradicted her statement. Counsel and the juvenile court both referred to section 17, subdivision (b), which discusses wobblers. Counsel asked the juvenile court to treat the offenses as a misdemeanor pursuant to that section. Subparagraph (A)(iii) is a straight felony, and the court would have no authority under section 17, subdivision (b) to treat it as a misdemeanor. Thus, it appears that the court and both parties understood that appellant was being sentenced under subparagraph (B).

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[4] Appellant points out, correctly that the petition alleged that subdivision (f)(1) was the appropriate punishment provision, and the juvenile court simply sustained the petition. Appellant is correct that subdivision (f)(1) does not apply to his case, as that subdivision sets forth the penalty for possession of a firearm on school grounds and there is no evidence that he was ever on school grounds. Rather the evidence showed that he was within 1,000 feet of a school, a violation which is punishable under subdivision (f)(2). This was the theory under which the case was adjudicated, and as we discuss in this opinion, all parties understood that appellant's violation would be punishable under subdivision (f)(2). Appellant does not claim any prejudice from the discrepancy between the petition and the evidence. Accordingly we order the petition corrected to read "626.9(f)(2)" in the last line of count 1.

On appeal, appellant argues that the only applicable punishment provision of section 626.9 is subdivision (g)(4). Appellant is mistaken. Subdivisions (g)(1) through (g)(3) require that a minimum three month jail term be served by a defendant who has a specified prior conviction, if he is granted probation or his sentence is suspended. Appellant did not have a prior conviction. Subdivision (g)(4) provides that "in unusual cases where the interests of justice would best be served" the trial court may elect not to impose the "minimum [three month] imprisonment required in this subdivision." Since appellant does not fall with the provisions of subdivisions (g)(1) through (g)(3), subdivision (g)(4), which provides an exception to subdivisions (g)(1) through (g)(3), has no application to him either.

3. Section 654

Appellant contends that the juvenile court erred in finding that section 654 did not apply to the two counts in this case. Respondent contends that section 654 does not apply because appellant has not shown that the juvenile court aggregated his terms under Welfare and Institutions Code section 726.

Generally, a juvenile court is required to specify the juvenile's maximum term of confinement when the juvenile is removed from the physical custody of his parent or guardian as the result of an order of wardship made pursuant to Welfare and Institutions Code section 602. (Welf. & Inst. Code, § 726, subd. (c); see *In re Danny H.* (2002) 104 Cal.App.4th 92, 106 [only when a court orders a minor removed from the physical custody of his parent or guardian is the court required to specify the maximum term the minor can be held in physical confinement]; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1743-1744 [same].) Here, appellant was removed from the physical custody of his mother as the result of an order of wardship pursuant to Welfare and Institutions Code section 602. Thus, the juvenile court should have specified his maximum term of confinement.

Respondent suggests in its brief that the juvenile court might have addressed this issue at a progress hearing set for December 15, 2011. Appellant has requested that we augment the record with two minute orders from that date, and we have granted that request. There is no reference to a maximum term of confinement of any sort in those orders. Accordingly, this matter is remanded to the juvenile court to make such a determination.

4. Predisposition credit

Appellant contends that he is entitled to two additional days of predisposition credit. Respondent agrees. We agree as well.

A juvenile court is required to calculate and give credit for the number of predisposition days in custody, including juvenile hall. (*In re Eric J.* (1979) 25 Cal.3d 522, 535-536; *In re Pedro M.* (2000) 81 Cal.App.4th 550, 556.) A partial day in custody, including the day of sentencing, is treated as a whole day for predisposition custody credit purposes. (*In re Marquez* (2003) 30 Cal.4th 14, 25-26.)

Appellant was awarded 25 days of predisposition credits at the last disposition hearing. Appellant was arrested on June 24, 2011 and the disposition hearing was on July 20, 2011, a period of 27 days. He appears to have been in custody that entire time. Thus, he is entitled to two additional days of predisposition credit.

Disposition

The juvenile court's orders are affirmed, but this matter is remanded for a determination of appellant's maximum period of confinement. On remand, the court is instructed to correct appellant's predisposition credit to reflect 27 days of predisposition credit.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.